76-518

In The

Supreme Court of the United States

October Term, 1976

No.

FRANKLIN COOPER,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, COUNTY OF NEW YORK

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(10031)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 563-2121
Philadelphia, Pa. (215) 563-5587
Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

In The

Supreme Court of the United States

October Term, 1976

No.

FRANKLIN COOPER,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, COUNTY OF NEW YORK

Petitioner, Franklin Cooper, petitions this Court for a writ of certiorari to review the order of Honorable Ernst H. Rosenberger rendered the 22nd day of March, 1976, which denied petitioner's motion to vacate his judgment of conviction for the crime of murder second degree. Petitioner served 18 years imprisonment thereon.

Mr. Justice Emilio Nunez of the Supreme Court, First Judicial Department, denied petitioner leave to appeal on the 25th day of May, 1976.

Mr. Justice Harry A. Blackmun, of this Court, granted an order on August 2, 1976, extending petitioner's time to file for a writ of certiorari until the 15th day of October, 1976.

OPINION BELOW

The opinion of Justice Rosenberger is annexed as part of the appendix.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Supreme Court of the State of New York, Appellate Division, First Department, denied leave to appeal on the 25th day of May, 1976, and Associate Justice Harry A. Blackmun, of this Court, extended petitioner's time to file for certiorari until the 15th day of October, 1976. A copy of said orders are annexed hereto and made a part hereof.

QUESTION PRESENTED

1. Whether petitioner was adequately represented by counsel when he pleaded guilty to murder second degree before the Supreme Court of the State of New York, County of New York (Fifth, Sixth and Fourteenth Amendments, United States Constitution)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

ESSENTIAL FACTS

The petitioner, Franklin Cooper, pleaded guilty on September 9, 1958, to the crime of murder second degree. In 1969 he filed a previous *coram nobis* application and received a modification of sentence, *nunc pro tunc*, to a term of 20 years to life, as of the date of the original sentence. That conviction and sentence were affirmed, without opinion, by the Appellate

* The indictment number in the Supreme Court, New York County, is 4009/57.

Division of the Supreme Court of the State of New York, First Department, on November 17, 1970 (*People v. Cooper*, 35 App. Div. 2d 911).

In the instant petition, the petitioner maintains that he is innocent of the crime charged. In addition, petitioner alleges that when he was allegedly "resentenced" in 1969 because of his claim that he had been denied effective assistance of counsel upon his original sentence, that he was merely "resentenced" *nunc pro tunc* and that his plea of guilty should have been vacated rather than merely being resentenced. The plea of guilty of September 9, 1958, of murder second degree, was to an indictment charging murder first degree. This plea also covered indictments numbered 3324 and 3328 of 1957, alleging robbery first degree.

The petitioner was only 24 years of age when he pleaded guilty and had never completed his schooling. He alleged in his affidavit seeking to vacate his plea, that he had been pressured into pleading guilty and that he had made previous applications to vacate that plea and even sued out a writ of *habeas corpus*, without success.

Petitioner Cooper is not a well-educated man and is merely seeking a day in court, even though it would mean going to trial on a murder first degree charge.

When Cooper appeared before Mr. Justice Schweitzer in the Supreme Court, New York County, he said that he had told his lawyer, Peter Sabbattino, Esq., that he was innocent.

Petitioner maintained that he had never been told of his right to appeal under the provisions of *People v. Montgomery*, 24 N.Y. 2d 130.

Ironically, on the 9th of October, 1969, Mr. Justice Schweitzer instructed the clerk to vacate the sentence of October

21, 1958, which had been imposed upon petitioner's plea of guilty, and then told the clerk to "arraign" the petitioner "*de novo* on his conviction."

Later, the court said that the rearraignment should be solely for the purpose of resentence.

At page 4 of the minutes of resentence, the petitioner quite pathetically reflected the fact that he really had never had any effective assistance of counsel when he said:

> "I never see any attorney. I would like to get an attorney."

The court then said:

> "Then I will get you an attorney."

Apparently a Legal Aid attorney by the name of Edward Gasthalter was called in and, at this juncture, was told to confer with the petitioner.

The petitioner, however, was thoroughly demoralized by this time and stated that since his motion to vacate was turned down, there was really nothing else he had to say. There is no question whatsoever, however, but that the petitioner wanted to vacate his plea of guilty altogether.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was deprived of adequate presentation of counsel at the time he pleaded guilty and was sentenced. His conviction should be set aside and an opportunity to withdraw his plea of guilty should be granted. Petitioner also maintains he is innocent of the crime charged (Fifth, Sixth and Fourteenth Amendments).

Petitioner herein maintains that he was never given his day in court and that he was not adequately represented by counsel. Cooper insists that he was innocent of the charges, but pleaded guilty because of inadequate representation of counsel.

The minutes of October 9, 1969 reveal that petitioner was seeking adequate assistance of counsel, but never got it.

In *Mapp v. Ohio,* 367 U.S. 643 at 659, this Court explained:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The right to counsel is a fundamental premise of the Sixth Amendment and Fourteenth Amendment of the United States Constitution. It is submitted that that right was abridged in the case at bar. (*Johnson v. Zerbst,* 304 U.S. 458; and *Gideon v. Wainwright,* 372 U.S. 335). See also, *Mempa v. Rhay,* 389 U.S. 128, and *McConnell v. Rhay,* 393 U.S. 2.

In *Martin v. United States,* 182 F.2d 225, 20 A.L.R. 2d 1236, *cert. denied,* 340 U.S. 892, the Court aptly observed:

"The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the constitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must then, or shortly be determined. Then is the opportunity afforded for presentation to the court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct errors or mistakes in reports of the defendant's past record; and, in short, to appeal to the equity of the court in its administration and enforcement of penal laws. Any judge with trial court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension of penalty. That it is true that such discussion sometimes has a contrary result, does not detract from the fact that the nature and possibilities of this important stage of the proceedings are such as make the absence of counsel at this time presumably prejudicial."

In *Johnson v. Zerbst, supra,* this Court further emphasized the important need for counsel at all stages of a proceeding, admonishing:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer — to the untrained layman may appear intricate, complex and mysterious."

Under the foregoing circumstances, it is respectfully submitted that petitioner was denied a Fifth, Sixth and Fourteenth Amendment's right to the adequate assistance of counsel.

In addition, since Cooper maintains that he is innocent of the charge, under any circumstances, he should have been permitted to withdraw his plea of guilty so that he could have his day in court, which up to this time he has never had.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: HON. EMILIO NUNEZ

Justice

The People of the State of New York,

-against-

Franklin Cooper,

Defendant.

M-1399

Indictment No.

4009/57

I, Emilio Nunez, a Justice of the Appellate Division, First Department, do hereby certify that, upon application timely made by the above-named defendant (by notice of appeal) for a certificate pursuant to Section 460.15 of the Criminal Procedure Law, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Department and permission to appeal from the order of the Supreme Court, New York County, entered on March 22, 1976 is hereby denied.

Certificate Denying Leave

Dated at New York, New York

May 25, 1976

s/ Emilio Nunez
Emilio Nunez, Justice

ORDER AND DECISION OF THE SUPREME COURT OF NEW YORK COUNTY

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART 35

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FRANKLIN COOPER,

Defendant.

Indictment No. 4009/57

ERNST H. ROSENBERGER, J.:

Petitioner, Franklin Cooper, now at liberty on a life parole after serving almost eighteen years in prison, seeks by way of writ of error coram nobis to vacate a guilty plea taken on September 9, 1958. He maintains his innocence of the crime charged.

In 1969, on a previous coram nobis application based on his claim that he was not advised of his right to appeal, petitioner was re-sentenced to a term of 20 years to life, nunc pro tunc, as of the date of his original sentence. The conviction and sentence

Order and Decision of the Supreme Court of New York County

were affirmed without opinion by the Appellate Division, First Department, on November 17, 1970 (35 AD 2d 911).

The first ground for petitioner's present application is an allegation that he was innocent of the crime allegedly committed on December 18, 1959, and that he was coerced by counsel to plead guilty.

The second ground alleged by petitioner is that his guilty plea was not vacated as a result of a "Montgomery" hearing in 1969, but that he was merely re-sentenced nunc pro tunc by Justice Mitchell Schweitzer.

Considering the second ground first, this court rejects the contention that defendant was entitled to more than resentencing in 1969. The only relief granted in People v. Montgomery, 24 NY 2d at page 134, by the Court of Appeals is as follows: "If his allegations prove to be meritorious, he should be resentenced so that his time to appeal will run anew."

Thus the full Montgomery sanction was invoked by Justice Schweitzer. Defendant was not entitled to have his conviction set aside because of failure to advise him of the right to appeal (People v. Curkendall, 36 AD 2d 979 [Third Dept. 1971]).

Defendant's main contention that he is innocent and that he now wants a trial so that his innocence can be shown is not a ground, without more, for a motion to vacate a judgment under section 440.10 of the Criminal Procedure Law.

The original plea and sentencing minutes indicate that in response to questioning by the court defendant stated that he was voluntarily pleading guilty. He was represented by counsel. He offers nothing except his bare eighteen-year-old allegation that the plea was not voluntarily taken. Without more evidence of that fact the conviction should not be set aside (People v.

Order and Decision of the Supreme Court of New York County

Moore, 36 AD 2d 869 [Third Dept. 1971]). Nor should a hearing be granted where petitioner does not show facts sufficient to warrant a hearing (see, for example, People v. Weeden, 38 AD 2d 637 [Third Dept. 1971]).

Lastly, since petitioner's motion comes eighteen years after his conviction, the possibility of litigating the original charge is almost nonexistent. The promptness or staleness of a complaint with respect to a guilty plea is a significant factor to be considered in deciding whether to set it aside (People v. Nixon, 21 NY 2d 338).

In view of all the foregoing reasons, the motion is denied.

Dated: February 22, 1976

So Ordered:

Ernst H. Rosenberger
J.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-78

FRANKLIN COOPER,

Petitioner

V.

NEW YORK

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1976.

s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 2nd day
of August, 1976.